



Asset Recovery Agency v Mucheru (Anti-Corruption and Economic Crimes Civil Suit E016 of 2019) [2022] KEHC 13002 (KLR) (Anti-Corruption and Economic Crimes) (22 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13002 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES CIVIL SUIT E016 OF 2019
EN MAINA, J
SEPTEMBER 22, 2022

BETWEEN

ASSET RECOVERY AGENCY APPLICANT

AND

DAVID MUGAI MUCHERU RESPONDENT

RULING

1. The respondent/applicant filed this notice of motion application under a certificate of urgency dated February 10, 2022. The application is brought under sections 1A and 1B of the [Civil Procedure Act](#) and Order 51 of the [Civil Procedure Rules, 2010](#) and seeks the following orders:
 - a. Spent
 - b. This honourable court be pleased to order that the respondent/applicant’s motor vehicle registration No KCD 022T Chassis No MROFZ29GT02510380, Engine number IKD6010397 be released by the assets recovery agency to the respondent/applicant forthwith.
 - c. This honourable court do grant any other relief as it may deem fit and appropriate to grant.
 - d. Costs be in the cause.”



2. The application is premised on the grounds stated on the face of it and the supporting affidavit of the respondent/applicant sworn on February 10, 2022. The grounds are stated as follows:

- a) The respondent/ applicant is the registered owner of motor vehicle KCD 012T Toyota Hilux Pickup Chassis No MROFZ29GT02510380, Engine Number 1KD6010397 which was impounded by the Applicant way back on February 4, 2021 to date, which vehicle the respondent/ applicant uses for delivery of farm produce including milk to the KCC and Brookside Limited Nakuru milk plants as well as other farm produce.
- b) The respondent/ applicant's farming activities have been greatly hampered by the unduly long unconscionable impounding and confiscation of the pick-up which has forced the respondent/applicant to hire alternative transport arrangements, especially for daily milk deliveries from my farm to milk plants in Nakuru belonging to the KCC and Brookside Company Limited.
- c) The respondent/applicant's farming operations and business has become completely unsustainable due to the alternative transport arrangements costs, whilst all the time his vehicle is lying impounded and grounded by the agency, notwithstanding full documented explanation that the vehicle was lawfully purchased by the respondent/applicant through a thoroughly documented process already served upon the agency.
- d) Respondent/applicant, his family and his workers are now suffering acute pecuniary embarrassment due to the above prevailing circumstances as the respondent/ applicant is now unable to access the market as his motor vehicle rots in the agency's yard.
- e) The orders sought are thus very urgent. Unless the vehicle is released to the respondent/ applicant immediately his means of livelihood, and that of his family and workers will collapse.”

3. The assets recovery agency (the applicant/respondent) opposed the application through an affidavit sworn by CPL Jeremiah Sautet on March 9, 2022.

4. The applicant/respondent contends that the respondent/

applicant was on February 4, 2021 arrested along the Oldonyo Nanyuki road within Laikipia County on upon suspicion that he was ferrying endangered wildlife trophy contrary to the provisions of the *Penal Code*; that a search conducted on the cabin and trailer of motor vehicle KCD 012 T yielded logs of wood suspected to be wildlife trophy and that samples of the wood were submitted to the Kenya Forestry Research Institute and upon analysis, the same were found to be *Osyris lanceolata* (sandalwood). This according to the applicant/respondent culminated in the respondent/applicant being charged with the offence of being in possession of wildlife trophy contrary to section 92(4) of the *Wildlife Conservation and Management Act, 2013* and the offence of conspiracy to commit a felony contrary to section 393 of the *Penal Code* in Kiambu CMCC No E233 of 2021. The respondent further contends that the motor vehicle is believed to be an instrumentality of crime or proceeds of crime obtained from illegitimate sources by the respondent/applicant, being trade in wildlife trophy and hence the reason the applicant obtained orders for preservation of the motor vehicle on March 11, 2021 in Misc Application No E007 of 2021 which orders were published in the Kenya Gazette through Notice No 2830 on March 26, 2021.



5. The applicant/respondent contends that in his statement recorded at the applicant's/respondent's office on October 10, 2021 the respondent/applicant revealed that he is a farmer and has three rental houses in Nyandarua; that therefore he is not experiencing any hardship; that the respondent/applicant has not given evidence warranting the variation of the preservation order under sections 88 and 89 of the *Proceeds of Crime and Anti-Money Laundering Act, 2009* (POCAML) and that moreover the hardship if any, does not outweigh the risk of the dissipation of the motor vehicle.
6. The respondent/applicant also avers that it filed a forfeiture application on January 10, 2022 and should the preservation orders be discharged it would render the forfeiture application nugatory. Lastly, the applicant/respondent asserts that the application has no merit and should be dismissed.

Submissions of the Applicant

7. Learned counsel for the applicant relied on the applicant's written submissions dated March 31, 2022.
8. Referring to the replying affidavit dated December 14, 2021 filed in opposition to the forfeiture application learned counsel for the respondent/applicant submitted that the motor vehicle in issue was purchased through a loan facility and an additional trade-in of his motor vehicle a Prado Reg No KAX 825N and that the loan was paid in installments between the years 2015 and 2017 using the earnings from his milk delivery services. Counsel pointed out that the applicant is a farmer who sells cereals to the National Cereals & Produce Board in Nakuru and also keeps dairy cattle whose milk he sells to the Kenya Cooperative Creameries (KCC) and the Brookside Creameries Ltd as evidenced by annexures DMM3 and DMM4 to the replying affidavit dated December 14, 2021; that the applicant has been using the impounded motor vehicle to transport the cereals and to deliver milk and the unduly long confiscation of the motor vehicle has hampered his farming activities and because he has been forced to hire alternative transport this has rendered his farming operations and business unsustainable. Counsel further asserts that the applicant, his family and workers are also suffering acute financial embarrassment and hardship as a result of the confiscation.

Submissions of the Respondent

9. For the applicant/respondent it was submitted that the application has been overtaken by events given that an application for forfeiture has already been instituted; that the application therefore offends section 89 of the *Proceeds of Crime and Anti-Money Laundering Act* and that the motor vehicle KCD 012T is an instrumentality of crime and the subject matter of the forfeiture proceedings pending before this court. Learned counsel for the respondent also argues that the motor vehicle was preserved by an order of this court and discharging the order would prejudice the applicant/respondent's case in the forfeiture proceedings.
10. Counsel further argues that the preservation order was made in conformity to section 82 of the *Proceeds of Crime and Anti-Money Laundering Act*; That despite the Applicant being charged in Kiambu CMCC E233 of 2021, the proceedings in this suit are civil in nature and have no bearing on the criminal process; That the Applicant has alternative sources of income and there is no reason for discharging the preservation order and further that in an application for preservation orders the standard of proof is on a balance of probabilities. To buttress this submission Counsel cited the case of *Phillips v United Kingdom 2001 ECHR 437* and *Martin Shalli v Attorney General of Namibia and others* High Court of Namibia case No. POCA 9/2011 where it was held:

“ 17. In terms of this section, this court must make a preservation order if the application is supported by evidence which discloses reasonable grounds to



believe that the property in question is an instrumentality of an offence referred to in schedule 1 or the proceeds of unlawful activities as defined.”

11. Counsel further submitted that section 121 of the *Criminal Procedure Code* also provides for the preservation of instrumentalities of crime as follows:

“121. When anything is so seized and brought before a court, it may be detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation.”

12. Counsel therefore urged the court to dismiss the application for lack of merit.

Issue for determination

13. The following issue arises for determination:

“Whether the preservation order issued by this court on March 11, 2021 should be varied or rescinded.”

Analysis and Determination

14. The Application as presented and the reliefs sought are in the nature of an application for variation of a preservation order as provided in section 89 of the *Proceeds of Crime and Anti-Money Laundering Act*. Essentially the application seeks the release of a motor vehicle preserved by the order of this court (Mumbi Ngugi J, as she then was), issued on March 11, 2021.

15. Section 89 states as follows:

“89. Variation and rescission of orders

(1) A court which makes a preservation order –

(a) May, on application by a person affected by that order, vary or rescind the preservation order or an order authorising the seizure of the property concerned or other ancillary order if it is satisfied—

- i. that the operation of the order concerned will deprive the applicant of the means to provide for his reasonable living expenses and cause undue hardship for the applicant; and
- ii. that the hardship that the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred; and



(b) shall rescind the preservation order when the proceedings against the defendant concerned are concluded.”

16. In line with Section 89 above, the primary consideration is whether the respondent/applicant has proven that the preservation order will deprive him of the means to provide for his reasonable living expenses and hence will cause him undue hardship, and whether such hardship outweighs the risk that the property in question may be destroyed, lost, damaged, concealed or transferred.
17. In this case the applicant’s alleged hardship arises from what he describes as having to hire alternative transport to deliver mil to KCC and Brookside and to carry on his cereals business. It would seem therefore that he still continues to carry on with his business although he has had to endure inconvenience arising from the preservation order. The fact that he continues to do business is in my view proof that he continues to earn an income despite the preservation order. Whatever inconvenience he suffers as a result of the order has not deprived him of the means to provide for his reasonable living expenses or those of his family. If it has then he has not laid before this court any evidence to persuade it of that fact.
18. It is also instructive that the applicant/respondent has already filed a forfeiture application. The same is yet to be heard and determined and releasing the motor vehicle which is the subject of that application would not only prejudice the applicant/respondent but it would also render the application nugatory because in the event the vehicle dissipates there would be nothing to forfeit. In any event the argument that the vehicle is not an instrumentality of crime is one that ought to be canvassed in the forfeiture proceedings but not here.
19. In the case of *Assets Recovery Agency v Hardi Enterprises Limited & 3 others* [2020] eKLR the court stated and I agree with it:-

“72. It is noteworthy that the applicants argued only in passing with respect to the requirement under section 89 of POCAMLA that they demonstrate the hardship that they faced as a result of the preservation orders. They did not, in my view, show how the orders will deprive them of the means to provide for their reasonable living expenses and cause undue hardship to them, and how such hardship outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred. The applicants have instead argued to a great extent about whether or not the assets and funds the subject of the preservation orders are proceeds of crime. However, these arguments must wait for the hearing of the substantive application for forfeiture. As the court in the *Asset Recovery Agency v Samuel Wachenje* case observed:

43. Whether or not the subject motor vehicles were born out of proceeds of crime, can only be canvassed at the hearing of the forfeiture application. The rival arguments placed before this court in this application cannot enable the court to make a finding on that issue one way or the other, with any degree of certainty.”

20. In the upshot I find no merit in the application and the same is dismissed with costs to the applicant/respondent.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 22ND DAY OF SEPTEMBER, 2022.

E N MAINA



JUDGE

